United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

75-7203

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

B

P/S

ROBERT ABRAHAMSON and
MARJORIE ABRAHAMSON,

Plaintiffs-Appellants,

vs.

MALCOLM K. FLESCHNER, WILLIAM J. BECKER,
HAROLD B. EHRLICH, LEON POMERANCE,
FLESCHNER BECKER ASSOCIATES, and
HARRY GOODKIN & COMPANY,

Defendants-Appellees.

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC

SULLIVAN & CROMWELL
Attorneys for Defendants
Malcolm K. Fleschner, William J.
Becker and Fleschner Becker Associates

RICHARD E. CARLTON
Of Counsel.

48 Wall Street
New York, New York 10005

HILL, BETTS & NASH
Attorneys for Defendant
Harold B. Ehrlich

MARK M. JAFFE
Of Counsel.

One World Trade Center
New York, New York 10048

March 22, 1977

18

TABLE OF CONTENTS

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

NO. 212 - SEPTEMBER TERM, 1975

DOCKET NO. 75-7203

- X

ROBERT ABRAHAMSON and MARJORIE ABRAHAMSON,

Plaintiffs-Appellants,

v.

MALCOLM K. FLESCHNER, WILLIAM J. BECKER, HAROLD B. EHRLICH, LEON POMERANCE, FLESCHNER BECKER ASSOCIATES and HARRY GOODKIN & COMPANY,

Defendants-Appellees.

- X

PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING IN BANC

Defendants-appellees Malcolm K. Fleschner, William J. Becker, Harold B. Ehrlich and Fleschner Becker Associates ("FBA") petition for rehearing pursuant to Fed. R. App. P. 40 and suggest rehearing in banc pursuant to Fed. R. App. P. 35, of those portions of the decision and judgment of this Court (Mansfield & Timbers, JJ.; Gurfein, J., dissenting) which hold, under the Investment Advisers Act of 1940, 15 U.S.C. 80b-1, et seq. (the "Act"):

1) that general partners of a private investment partnership are "investment advisers" within the meaning of Section 202(a)(11) of the Act, notwithstanding that such persons were not intended by Congress to be covered by the Act and have never been regulated as "advisers" by the S.E.C.;

2) that there is an implied private right of action for damages under the Act, notwithstanding persuasive evidence that Congress in 1940 deliberately chose not to create such rights and has consistently declined to do so since then; and

3) that the complaint states a claim for damages under Section 206 of the Act, although the plaintiffs suffered no out-of-pocket damages and in fact realized substantial profits from their participation in the partnership.

REASONS FOR GRANTING REHEARING

The majority's virtually unlimited construction of the term "investment adviser", the creation more than 36 years after the passage of the Act of an implied private right of action (something which Congress itself has repeatedly declined to do), and the rejection of the long-established "out of pocket" damages rule, present questions of exceptional importance. The majority's decision, if permitted to stand, threatens the viability of closely-held investment entities and will tend to force private investment capital into large, institutionally-dominated investment funds.

I. THE MAJORITY ERRED IN HOLDING THAT ALL "PERSONS WHO [MANAGE] THE FUNDS OF OTHERS FOR COMPENSATION" ARE PER SE "INVESTMENT ADVISERS" WITHIN THE MEANING OF THE ACT

In holding that all "persons who [manage] the funds of others for compensation" are "investment advisers",* the majority (i) ignored the absence of any congressional intent to regulate

---

* This issue was not reached by the District Court and was not raised on appeal until the plaintiffs and the S.E.C. filed their supplemental briefs. Defendants thus never had an

[continued on next page]

private investment entities such as FBA, (ii) misapprehended the nature of such entities and (iii) failed to recognize that the S.E.C. has held them not subject to the Act.

Section 202(a)(11) of the Act defines "investment adviser":

> "'Investment adviser' means any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities. . . ." 15 U.S.C. § 80b-2(a)(11).

Specifically excluded from this definition are "such other persons not within the intent of this paragraph, as the Commission may designate by rules and regulations or order."

The majority erroneously construed this definition in holding that the general partners of FBA are "investment advisers" to the limited partners because (i) the general partners received compensation from the partnership; and (ii) under the terms of the partnership agreement, the general partners invested the funds of the partnership and caused to be sent to all partners one sentence monthly reports setting forth the percentage increase or decrease in the value of the partnership's holdings.* Under this test,

---

[continued from p. 2]

opportunity even to be heard on this point and the Court should not have decided the issue in the absence of a full factual record and without findings by the District Court. Fountain v. Filson, 336 U.S. 681, 683 (1949); Republic Technology Fund, Inc. v. Lionel Corp., 483 F.2d 540, 553 (2d Cir. 1973), cert. denied, 415 U.S. 918 (1974).

* The monthly reports did not contain recommendations or advice as to particular securities or mention specific investments.

virtually every officer of a publicly-held corporation, every trustee of real or personal property and every managing or general partner is an "investment adviser" subject to regulation by the S.E.C. and to damage actions by disappointed investors.

A. Congress Did Not Intend To Regulate Private Investment Partnerships Under The Act

Congress did not intend to subject every trustee of an estate, every officer of a publicly-held company, every controlling partner of a partnership or general partner of a limited partnership to the Act merely because their activities encompass the management of investments for the beneficial interest of others or because they report thereon to the beneficiaries, stockholders or partners as the case may be.

That Congress did not intend to reach everyone who manages the investments of others is demonstrated by recent legislative history. On May 12, 1976, the House Subcommittee on Consumer Protection & Finance reported to the 94th Congress H.R. 13737, which would have mandated three studies by the S.E.C.: (i) who should be included in the term "investment adviser" and whether such inclusion would violate constitutional rights; (ii) the extent to which self regulation was advisable and (iii) whether federal regulations duplicate state regulations. (See Appendix A, Sec. 9.) If the term "investment adviser" was intended, as the majority has held, to encompass all who manage investments, it would have not been necessary for Congress to consider the question as to who should be included in the definition.*

* H.R. 13737 was not acted upon by the 94th Congress and as amended was reintroduced on January 19, 1977 as H.R. 2105 in the 95th Congress. (Appendix B) The S.E.C., however, has apparently withdrawn support for the bill and it appears no action will be taken thereon.

The thrust of the Act and its definition of "investment adviser" were by its plain language directed to the problems and abuses of those who hold themselves out to the public as offering investment advisory services and was not directed to regulation of the affairs of internally-managed private investment partnerships. S. Rep. No. 1775, 76th Cong., 3rd Sess. 21 (1940) The general partners of FBA did not offer investment advisory services to the public and thus do not fall within the class of persons which were intended to be subject to the regulation of the Act. They simply managed a partnership comprised of themselves, their families and friends.

B. The Majority Misapprehended The Nature of FBA

In holding that all persons "who [manage] the funds of others for compensation" are investment advisers as a matter of law, the majority overlooked critical facts which demonstrate that these defendants were not investment advisers, but managers of their own privately-held business operating in the partnership form:

(1) The partnership was comprised of the general partners, their families, relatives and friends.

(2) The partnership invested only its own funds.

(3) The partnership and the general partners did not purport to, and did not, advise the limited partners "as to the advisability of investing in, purchasing or selling [particular] securities" or issue or promulgate "analyses or reports concerning

securities."* 15 U.S.C. § 80b-2(a)(11). Rather, they invested the undivided partnership assets.

(4) The general partners not only had the bulk of their personal assets in the partnership, but assumed the full risk of its liabilities. This circumstance is in sharp contrast to the kind of riskless activity by investment advisers which Congress sought to regulate under the Act.**

(5) There was no solicitation of investments from the public.

(6) There was no evidence or allegation that the general partners held themselves out to the public as offering investment advice through FBA.

(7) As general partners, defendants were subject to the full reach of state law remedies for breach of any duty owed to the limited partners.

FBA was organized in 1965 as a partnership comprised of the Fleschner family and a few close friends, including the Abrahamsons. With the addition in 1966 of Becker and members of his family and in 1968 of Ehrlich, it continued to be comprised almost exclusively of the general partners and their immediate

---

* Merely advising the limited partners concerning the status of their investments cannot be construed as constituting the rendering of investment advice without making virtually everyone who manages capital of others "investment advisers".

** "Individuals assuming to act as investment advisers at present can enter profit-sharing contracts which are nothing more than 'heads I win, tails you lose' arrangements. Contracts with investment advisers which are of a personal nature may be assigned and the control of funds of investors may be transferred to others without the knowledge or consent of the client." S. Rep. No. 1775, 76th Cong., 3rd Sess. 22 (1940).

families, relatives and friends. At all times the majority of the partners were relatives by blood or marriage of Fleschner or Becker.

Fleschner and members of his family contributed 68.4% of the partnership's assets in 1965. Thereafter, the capital accounts of the general partners and their families constituted 69.7% on April 1, 1966, 56.5% on October 1, 1966, 56.9% on October 1, 1967 and 39.3% on October 1, 1968, when Ehrlich became a general partner and a number of his friends became limited partners. During the period in question, each of the general partners had the bulk of his personal assets invested in the partnership.

C. The S.E.C. Has Never Attempted To Regulate Private Investment Partnerships Under The Act

Rulings of the Securities and Exchange Commission* establish that general partners of an internally managed partnership such as FBA were not intended by Congress to be regarded as "investment advisers."** In the Matter of Roosevelt & Son, Investment

---

* The S.E.C. Staff in its amicus brief significantly omitted any reference to these rulings or to those portions of its Institutional Investor Study Report, Comm. on Interstate and Foreign Commerce, H.R. Doc. No. 92-64, 92nd Cong. 1st Sess. 283-324 (1971), where it reported on its study of private investment partnerships without the slightest suggestion that it regarded the general partners of such partnerships as "investment advisers" or that the operations of such partnerships without registration was in violation of the Act.

** The S.E.C. is apparently still uncertain whether to require registration by such partnerships, which were previously assumed by both the SEC and the industry to be exempt from the provisions of the Act:

> "Among other things, the S.E.C. staff said it would probably have a decision early this week on whether private investment partnerships should begin registering with it pending appeal of a Federal appeals court decision last week that these previously exempt partnerships were subject to the Investment Advisors Act administered by the commission." N.Y. Times, Mar. 7, 1977, at 39, col. 4.

Advisers Act Release No. 54 (September 2, 1949), [1948-52 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 76,016 (1949), the S.E.C. ruled that a partnership was not an investment adviser within the intent of the Act where it managed and supervised investments in real and personal property both for the account of the partnership and others and where between 90 and 100 accounts were carried for members of the partners' family and friends. See In the Matter of Augustus P. Loring, Jr., 11 S.E.C. 885 (1942); Selzer v. Bank of Bermuda Ltd., 385 F. Supp. 415, 420 (S.D.N.Y. 1974).

In the Matter of The Pitcairn Company, Investment Advisers Act Release No. 52 (March 7, 1949), [1948-52 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 75,990 (1949), the SEC exempted from the definition of "investment adviser" a closely held corporation whose "business [consisted] of the holding, investing and reinvesting of its funds, the management of such investments" and an insignificant amount of manufacturing. Like FBA,

> "The company never has solicited and has no intention of soliciting anyone to use its investment advisory service, nor would it render any such service for a fee to anyone other than an officer or stockholder of the company nor has it ever done so." Id. at p. 78,417.

Clearly, defendants are not "investment advisers" within the meaning of the Act.

II. NO PRIVATE RIGHT OF ACTION FOR DAMAGES MAY BE IMPLIED UNDER SECTION 206

In holding that a private right of action for damages may be implied under Section 206, the majority (i) applied improper standards of statutory construction; (ii) ignored persuasive legislative history that Congress did not intend to permit private damage actions under the Act; and (iii) misconceived the scope and impact

of its decision. In so holding, it embarked on a course that will open the federal courts to the very kind of "would have" claimants to which the Supreme Court closed the doors under Section 10(b) in Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975).*

A. The Majority Erred In Holding There Is A Presumption That Congress Intended To Create Implied Rights Of Action Unless There Is "Clear Evidence" To The Contrary

The majority misapplied instructions by the Supreme Court regarding legislative history and implied rights of action. The majority stated:

> "We hesitate to reach such a result [failure to recognize a right of action] absent clear evidence from the Act's legislative history that private actions were not intended" (Slip Op. at 6231) (emphasis added).

The test of Congressional intent applied by the majority is the same as that used in Chris-Craft Industries, Inc. v. Piper Aircraft Corp., 480 F.2d 341 (2d Cir. 1973):

> "We will not infer from the silence of the statute that Congress intended to deny a federal remedy [to Chris-Craft] . . . ." 480 F.2d at 360-61.

Two days before the opinion was released in this action, however, the Supreme Court squarely rejected this very method of analyzing legislative history and reversed this Court's holding in Chris-Craft that an implied right of action should be inferred from Congressional silence.

Chief Justice Burger, writing for the Supreme Court, stated:

---

* "The Supreme Court -- by its language in one case (Blue Chip v. Manor Drug) decrying the burden of vexatious securities litigation, and by its holding in another (Hochfelder v. Ernst & Ernst) denying liability for damages on negligence claims under Rule 10b-5 -- has expressed the growing realization that it is time for review and consolidation and not for further administrative and judicial adventure." Borden, The S.E.C. Should Not Be Making Law, N.Y. Times, Mar. 6, 1977, § 3, at 12, col. 5.

> "Although the historical materials are barren of any express intent to deny a damages remedy to tender offerors as a class, there is, as we have noted, no indication that Congress intended to create a damages remedy in favor of the loser in a contest for control." Piper v. Chris-Craft Industries, Inc., No. 75-353 (U.S. Sup. Ct., Feb. 23, 1977) (Slip Op. at 35).

The Supreme Court also cautioned:

> "As Mr. Justice Frankfurter reminded us, 'We must be wary against interpolating our notions of policy in the interstices of legislative provisions.'" (Id. at 23)*

B. The Legislative History Demonstrates Congress Did Not Intend To Create Private Rights Of Action For Violations Of The Act

Even under the majority's "clear evidence" test, however, it is apparent that Congress did not intend to permit such actions. In 1940, if a Congressman believed that a statute should not provide a private action for damages, his recourse was (i) to avoid writing provisions for such an action into the statute, and (ii) to avoid conferring district court jurisdiction over "actions at law brought to enforce any duty or liability created by" the statute. This is what Congress did when it deleted such language from the S.E.C.'s draft of the Advisers Act and it is this which differentiates the Act from other federal securities acts. Plainer evidence of Congress's intent not to create private rights of action cannot be found. Judge Gurfein points out in his dissent that Congress was extremely cautious when it embarked on the regulation

---

* "[W]hen the S.E.C. finds within its enabling statute a reach never intended, or the courts use the doctrine, as they have, of implied civil liability to create damage actions that the legislature never intended, they may or may not be correctly expressing the relevance of the statutory policy to the perceived wrong. But they are demonstrably ill-equipped to contrive a suitable remedy -- to make the punishment fit the crime." Borden, supra, p. 9n.

of investment advisers, and the implication of a private right of action under the Act is inconsistent with that congressional caution.*

Moreover, Congress has carefully reviewed the Advisers Act on three separate occasions since 1940 -- in 1960, 1970 and 1976 -- and has refused to do legislatively what the majority now attempts to do judicially.

In 1960, "extensive proposals" concerning the securities laws resulted in no change in Section 214 (the jurisdictional section of the Act), nor in the creation of any express right of action, despite the fact that 19 changes were effected in 11 of the Act's 21 sections.

In 1970, Congress created a carefully delineated private right of action under Section 36(b) of the Investment Company Act, which was Title I of the bill that contained the Advisers Act as Title II, against advisers of investment companies. It created no such right of action against investment advisers generally, thereby reaffirming its intention not to create private rights of action under the Advisers Act.

---

* "The attempted withholding of jurisdiction over actions at law in the Advisers Act indicates that Congress was not intending to provide for any liability beyond injunctive relief. . . .

* * *

"[T]he Advisers Act, as distinguished from every other securities act, does not provide for any express civil liability in damages. The majority offers no explanation for such an omission which must have been a studied omission. I think it is highly relevant that in each of the other Acts Congress itself did provide for some express civil liability, yet under the Advisers Act it failed to include a single section imposing liability for damages. . . . This indicates rather that, in its cautious approach to the regulation of investment advisers, Congress was not yet ready to impose any civil liability for damages." (Slip Op. at 6245-47 (dissenting opinion) (emphasis in original)).

Finally, in 1976, Congress failed to act on extensive changes in the Advisers Act proposed by the SEC,* including a proposed amendment which would have reinserted in Section 214 the precise jurisdictional words which Congress in 1940 deleted from the SEC's proposed bill in response to objections by the investment advisory industry. (Slip Op. at 6251-52 and at 6244 n. 3 (dissenting opinion)).

The judicial creation of a private action for damages -- more than 36 years after passage of the Act and less than two months after Congress refused to adopt the S.E.C.'s jurisdictional proposal -- directly contravenes the principles enunciated by the Supreme Court in Blue Chip. There the Supreme Court, in rejecting an attempt to relax the "in connection with" requirement of Section 10(b), specifically cited as evidence of legislative intent Congress's failure to enact S.E.C.-proposed amendments which would have done just that. 421 U.S. 723, 732-33, 756-57 (1975). The same logic requires the same conclusion: that Congress did not intend to afford private actions for damages under the Advisers Act and that the federal courts should not usurp the legislative function.

C. The Majority Misapprehended The Effect Of The New Private Right Of Action Which It Created

In finding a private right of action for damages under

---

* The SEC's proposals came just three weeks after this Court requested supplemental briefs to "shed some light on the legislative history of the Advisers Act and particularly the reason, if any, that Congress used different phraseology in Section 214 of the Advisers Act than in the corresponding jurisdictional provisions of the other federal securities laws." 527 F.2d 27 (2d Cir. 1975).

Section 206, the majority disregarded at least two fundamental policy considerations underlying Blue Chip and guiding the federal courts. They are to avoid (i) the spawning of "vexatious litigation" and (ii) the placing upon triers of fact the burden of deciding "hazy issues of historical fact the proof of which depended almost entirely on oral testimony." Blue Chip, supra at 743.

The majority's holdings that the general partners of FBA are "investment advisers" and that a private action for damages lies under the Act accords standing to sue in the federal courts to a new and practically limitless class of plaintiffs. Contrary to the rationale of Blue Chip, the holding opens the doors of the federal courts to all manner of disappointed investors wherever control over the investment decisions of the partnership or other entity in which they have invested is lodged with its management. Thus, the limitation on the class of claimants formulated by the majority, i.e., "[u]nder Section 206, the plaintiff class is limited to the investment adviser's own clients" (Slip Op. at 6239), is as a practical matter, no limit at all. Moreover, such formulation is inconsistent with the express language of Section 206 which includes both clients and "prospective clients" of advisers. But Blue Chip applies to both "would have" buyers and "would have" sellers and the claim of the plaintiffs here is in the final analysis no different under the Advisers Act than it is under Section 10(b); that is, had they known certain facts they "would have" withdrawn from FBA at the height of the market.

The majority similarly errs in attempting to demonstrate that an action like that of plaintiffs here does not run

afoul of another of Blue Chip's policy concerns -- the avoidance of proof problems where plaintiffs claim they relied on a misstatement or omission but can offer only their uncorroborated oral testimony as evidence. The majority waves away the suggestion that reliance or nonreliance on the adviser's advice will be difficult to prove by creating a new presumption of reliance:

> "Since the investment adviser is compensated for his services, both client and adviser understand that the client will rely on the adviser's judgment and advice" (Slip Op. at 6239).

However, as Judge Gurfein stated in dissent:

> "There is a distinct danger that, by implying an open-ended private right of action, the court is giving the clients of investment advisers carte blanche to convert themselves from victims to defrauders" (Slip Op. at 6253).

III. THE COURT ERRED IN NOT ADHERING TO THE OUT-OF-POCKET DAMAGES RULE

In providing the District Court with guidance on the issue of damages, the majority rejected numerous decisions of this Court and other circuits* holding that the proper measure of damages in federal securities cases is out-of-pocket loss and fashioned a measure of recovery that is wholly ad hoc and inconsistent with the rationale of Blue Chip.

The majority's measure of damages invites clients of investments advisers, whether they have made profits from their investments or not, to sue advisers if securities which they sold went up or securities which they bought went down. In the absence of any evidence Congress intended such a result, the imposition of

---

* E.g., Fershtman v. Schectman, 450 F.2d 1357, 1361 (2d Cir. 1971), cert. denied, 405 U.S. 1066 (1972); Estate Counseling Service, Inc. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 303 F.2d 527, 533 (10th Cir. 1962).

a new area of liability under the federal securities laws upon the large and extremely varied group of persons and entities who fall within the majority's definition of "investment advisers" and departure from the "out of pocket" damages rule are exercises which this Court should not undertake.

CONCLUSION

The majority's decision expanding the class of "investment advisers" subject to the Act, creating judicially implied private rights of action and permitting the recovery of speculative damage awards by plaintiffs who with the benefit of 20/20 hindsight realize they would have made larger profits if they sold higher or bought lower, cannot be reconciled with recent decisions of the Supreme Court, with prior decisions of this Court or with the legislative history of the Act. For these reasons, rehearing should be granted and the matter should be heard in banc.

March 22, 1977

Respectfully submitted,

SULLIVAN & CROMWELL
48 Wall Street
New York, New York 10005

Richard E. Carlton
Of counsel

Attorneys for Defendants
Fleschner, Becker and
Fleschner Becker Associates

HILL, BETTS & NASH
One World Trade Center
Suite 5215
New York, New York 10048

Mark M. Jaffe
Of counsel

Attorneys for Defendant
Ehrlich

[SUBCOMMITTEE PRINT]

JULY 30, 1976

Showing H.R. 13737 as ordered reported by the Subcommittee on Consumer Protection and Finance

94TH CONGRESS
2D SESSION

H. R. 13737

IN THE HOUSE OF REPRESENTATIVES

MAY 12, 1976

Mr. MURPHY of New York introduced the following bill; which was referred to the Committee on Interstate and Foreign Commerce

[Strike out all after the enacting clause and insert the part printed in italic]

A BILL

To amend the Investment Advisers Act of 1940 to authorize the Securities and Exchange Commission to prescribe standards of qualification and financial responsibility for investment advisers, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

~~That this Act may be cited as the "Investment Advisers Act Amendments of 1976".~~

~~SEC. 2. Section 208 of the Investment Advisers Act of 1940 (15 U.S.C. 80b-8) is amended by adding at the end thereof the following new subsections:~~

~~"(e) No investment adviser registered or required to be registered under section 203 of this title shall make use~~

Sec 12

~~of the mails or any means or instrumentality of interstate commerce in connection with his business as an investment adviser unless such investment adviser and all natural persons associated with such investment adviser meet such standards of training, experience, competence, and such other qualifications, including minimum age and contractual capacity, as the Commission finds necessary or appropriate in the public interest or for the protection of investors. The Commission shall establish such standards by rules and regulations, which may—~~

~~"(1) specify that all or any portion of such standards or qualifications shall be applicable to any class of investment advisers and persons associated with investment advisers; and~~

~~"(2) require persons in any class to submit to such tests or examinations as may be prescribed in accordance with such rules and regulations.~~

~~The Commission, by rule, may prescribe reasonable fees and charges to defray its costs in carrying out this subsection, including, but not limited to, fees for any test administered by it or under its direction.~~

~~"(f) No investment adviser registered or required to be registered under section 203 of this title shall make use of the mails or any means or instrumentality of interstate commerce in connection with his business as an investment adviser in~~

~~contravention of such rules and regulations as the Commission shall prescribe as necessary or appropriate in the public interest or for the protection of investors to provide safeguards with respect to the financial responsibility of investment advisers. The Commission, by rule, may prescribe reasonable fees and charges to defray its costs in carrying out this subsection.~~

~~"(g) The Commission is authorized, in connection with the promulgation of rules and regulations under subsections (c) and (f) of this section—~~

~~"(1) to create one or more advisory committees pursuant to the Federal Advisory Committee Act;~~

~~"(2) to employ one or more outside experts; and~~

~~"(3) to hold such public hearings as it may deem advisable.".~~

~~SEC. 3. Section 203 (b) of the Investment Advisers Act of 1940 (15 U.S.C. 80b-3 (b)) is amended by striking out paragraph (1) thereof and redesignating paragraphs (2) and (3) as paragraphs (1) and (2), respectively.~~

~~SEC. 4. Section 203 (g) of the Investment Advisers Act of 1940 (15 U.S.C. 80b-3 (g)) is amended by striking out "subsection (d)" and inserting in lieu thereof "subsection (c) or subsection (e)".~~

~~SEC. 5. The first sentence of section 211 (e) of the Investment Advisers Act of 1940 (15 U.S.C. 80b-11 (e)) is amended to read as follows: "Orders of the Commission under this title (except orders granting registration pursuant to section 203 (e) of this title) shall be issued only after appropriate notice and opportunity for hearing.".~~

~~SEC. 6. The first sentence of section 211 of the Investment Advisers Act of 1940 (15 U.S.C. 80b-14) is amended to read as follows: "The district courts of the United States and the United States courts of any territory or other place subject to the jurisdiction of the United States shall have jurisdiction of violations of this title or the rules, regulations, or orders thereunder, and, concurrently with State and territorial courts, of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of, this title or the rules, regulations, or orders thereunder.".~~

~~SEC. 7. Section 202 (a) (10) of the Investment Advisers Act of 1940 (15 U.S.C. 80b-2 (a) (10)) is amended by inserting before the period at the end thereof a comma and the following: "and includes intrastate use of (A) any facility of a national securities exchange or of a telephone or other interstate means of communication, or (B) any other interstate instrumentality".~~

SEC. 8. Section 202(a)(17) of the Investment Advisers Act of 1940 (15 U.S.C. 80b-2(a)(17)) is amended to read as follows:

"(17) The term 'person associated with an investment adviser' means any partner, officer, or director of such investment adviser (or any person performing similar functions), or any person directly or indirectly controlling, controlled by, or under common control with such investment adviser, including any employee of such investment adviser, except that for the purposes of section 203 of this title (other than subsection (f) thereof), persons associated with an investment adviser whose functions are clerical or ministerial shall not be included in the meaning of such term. The Commission may, by rules and regulations, classify, for the purposes of any portion or portions of this title, persons associated with an invetment adviser within the meaning of this paragraph.".

SEC. 9. Section 202 of the Investment Advisers Act of 1940 (15 U.S.C. 80b-2) is amended by adding at the end thereof the following new subsections:

"(e) The Commission is authorized and directed to make a study of the extent to which persons not included in the definition of 'investment adviser' or specifically excluded therefrom engage in activities similar to those engaged in by investment advisers, including but not limited to (i)

~~the furnishing of advice, either directly or through publications or writings, as to the value of securities or the advisability of investing in, purchasing, or selling securities, (ii) the issuance or promulgation of analyses and reports concerning securities, and (iii) the exercise of investment discretion with respect to securities accounts, and whether the exclusion of such persons from the definition of 'investment adviser' is consistent with the protection of investors and the other purposes of this title. The Commission shall report to the Congress, within eighteen months from the date of enactment of this subsection, the results of its study together with such recommendations for legislation as it deems advisable.~~

~~"(d) The Commission is authorized and directed to make a study of whether and to what extent the protection of investors and the other purposes of this title would be facilitated by the establishment of one or more self-regulatory organizations which would be registered with the Commission under this title and, subject to appropriate Commission oversight, adopt rules, establish standards of conduct, take appropriate disciplinary action, establish and administer tests, and perform such other functions with respect to the regulation of their members as are consistent with the purposes of this title. The Commission shall report to the~~

~~Congress, within eighteen months from the date of enac~~
~~ment of this subsection, the results of its study together with~~
~~such recommendations for legislation as it deems advisable.~~

~~"(c) The Commission is authorized, in furtherance of~~
~~the studies required by subsections (c) and (d) of this~~
~~section, to create one or more advisory committees pursuant~~
~~to the Federal Advisory Committee Act, to employ one or~~
~~more outside experts, and to hold such public hearings as~~
~~it may deem advisable.".~~

~~SEC. 10. This Act shall become effective on the date of~~
~~its enactment.~~

That this Act may be cited as the "Investment Advisers Act Amendments of 1976".

SEC. 2. Section 208 of the Investment Advisers Act of 1940 (15 U.S.C. 80b–8) is amended by adding at the end thereof the following new subsections:

"(e)(1) No investment adviser, unless exempt from registration pursuant to section 203(b), shall make use of the mails or any means or instrumentality of interstate commerce in connection with his business as an investment adviser unless such investment adviser and all natural persons associated with such investment adviser meet such standards and qualifications consisting of (A) passing an appropriate

test or examination, or (B) appropriate training or experience, and such standards relating to contractual capacity, as the Commission finds necessary or appropriate in the public interest or for the protection of investors.

"(2) The Commission shall establish such standards and qualifications by rules and regulations, which may specify that all or any portion of such standards and qualifications shall be applicable to any class of investment advisers and persons associated with investment advisers, except that the Commission shall not require any investment adviser or person associated with an investment adviser who has passed a test or examination to meet requirements relating to training or experience. Such rules and regulations shall not apply to any investment adviser or person associated with an investment adviser meeting standards and qualifications determined by the Commission to be a satisfactory alternative for the purposes of this subsection.

"(3) The Commission shall, prior to the adoption of any rule or regulation prescribing any test or examination pursuant to this subsection, consult the securities commissioners (or any agency or officer performing like functions) of those States which require investment advisers and associated persons of investment advisers to submit to a test or examination, for the purpose of avoiding, to the extent feasible,

any undue burdens which might result from duplicative testing or examination requirements.

"(4) The Commission, by rules and regulations, may prescribe reasonable fees and charges to defray its costs in carrying out this subsection, including, but not limited to, fees for any test administered by it or under its direction.

"(f) No investment adviser who (1) is authorized to exercise investment discretion, as defined in section 3(a)(35) of the Securities Exchange Act of 1934, with respect to an account, (2) has access to securities or funds of a client, or (3) is an investment adviser of an investment company, as defined in section 2(a)(20) of title I of this Act, unless exempt from registration pursuant to section 203(b), shall make use of the mails or any means or instrumentality of interstate commerce in connection with his business as an investment adviser in contravention of such rules and regulations as the Commission shall prescribe as necessary or appropriate in the public interest or for the protection of investors to provide safeguards with respect to the financial responsibility of such investment advisers. Such rules and regulations shall not apply to any investment adviser registered under section 15 of the Securities Exchange Act of 1934 and subject to safeguards with respect to financial responsibility determined by the Commission to be a satisfac-

tory alternative for the purposes of this subsection. The Commission, by rules and regulations, may specify that all or any portion of such safeguards shall be applicable to any class of such investment advisers and may prescribe reasonable fees and charges to defray its costs in carrying out this subsection.

"(g) The Commission is authorized, in connection with the promulgation of rules and regulations under subsections (e) and (f) of this section, to create one or more advisory committees pursuant to the Federal Advisory Committee Act, to employ one or more outside experts, and to hold such public hearings as it may deem advisable.".

SEC. 3. Section 203(b) of the Investment Advisers Act of 1940 (15 U.S.C. 80b–3(b)) is amended by striking out paragraph (1) thereof and redesignating paragraphs (2) and (3) as paragraphs (1) and (2), respectively.

SEC. 4. Section 203(g) of the Investment Advisers Act of 1940 (15 U.S.C. 80b–3(g)) is amended by striking out "subsection (d)" and inserting in lieu thereof "subsection (c) or subsection (e)".

SEC. 5. The second sentence of section 203(h) of the Investment Advisers Act of 1940 (15 U.S.C. 80b–3(h)) is amended to read as follows: "If the Commission finds that any person registered under this section, or who has pending an application for registration filed under this section, is

no longer in existence or is not engaged in business as an investment adviser, the Commission shall by order cancel the registration or application of such person.".

SEC. 6. The first sentence of section 211(c) of the Investment Advisers Act of 1940 (15 U.S.C. 80b–11(c)) is amended to read as follows: "Orders of the Commission under this title (except orders granting registration pursuant to section 203(c) of this title) shall be issued only after appropriate notice and opportunity for hearing.".

SEC. 7. The first sentence of section 214 of the Investment Advisers Act of 1940 (15 U.S.C. 80b–14) is amended to read as follows: "The district courts of the United States and the United States courts of any territory or other place subject to the jurisdiction of the United States shall have jurisdiction of violations of this title or the rules, regulations, or orders thereunder, and, concurrently with State and territorial courts, of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of, this title or the rules, regulations, or orders thereunder.".

SEC. 8. Section 202(a)(10) of the Investment Advisers Act of 1940 (15 U.S.C. 80b–2(a)(10)) is amended by inserting before the period at the end thereof a comma and the following: "and includes intrastate use of (A) any facility of a national securities exchange or of a telephone

or other interstate means of communication, or (B) any other interstate instrumentality".

SEC. 9. Section 202(a)(17) of the Investment Advisers Act of 1940 (15 U.S.C. 80b–2(a)(17)) is amended to read as follows:

"(17) The term 'person associated with an investment adviser' means (A) any partner, officer, or director of such investment adviser (or any person performing similar functions), (B) any person directly or indirectly controlling or controlled by such investment adviser, including any employee of such investment adviser, or (C) any person directly or indirectly under common control with such investment adviser who furnishes advice or issues analyses or reports to or for such investment adviser or who, if a natural person, has responsibility for, or performs duties connected with, the activities of such investment adviser; but does not include, for the purposes of section 203 (other than subsection (f) thereof) and section 208(e) of this title, persons associated with an investment adviser whose functions are clerical or ministerial. The Commission may, by rules and regulations, classify, for the purposes of any portion or portions of this title, persons associated with an investment adviser within the meaning of this paragraph.".

SEC. 10. Section 202 of the Investment Advisers Act of

1940 (15 U.S.C. 80b–2) is amended by adding at the end thereof the following new subsections:

"(c) The Commission is authorized and directed to make a study of the extent to which persons not included in the definition of 'investment adviser' or specifically excluded therefrom engage in activities which are the same as or similar to those engaged in by investment advisers, including but not limited to (1) the furnishing of advice, either directly or through publications or writings, as to the value of securities or the advisability of investing in, purchasing, or selling securities, (2) the issuance or promulgation of analyses or reports concerning securities, and (3) the exercise of investment discretion with respect to securities accounts, and whether the omission or exclusion of such persons from the definition of 'investment adviser' is consistent with the protection of investors and the other purposes of this title. Such study shall include an analysis of the extent to which the inclusion of additional persons in the definition of 'investment adviser', including, but not limited to, those persons who render investment advice, through speech or publication, in a nonindividualized manner, would contravene the rights of freedom of speech and freedom of the press, and the right to petition the Government for a redress of grievances guaranteed by the first amendment to the Constitution of the United States. The

Commission shall report to the Congress, within eighteen months from the date of enactment, the results of its study together with such recommendations for legislation as it deems advisable.

"(d) The Commission is authorized and directed to make a study of whether and to what extent the protection of investors and the other purposes of this title would be facilitated by the establishment of one or more self-regulatory organizations which would be registered with the Commission and, subject to appropriate Commission oversight, adopt rules, establish standards of conduct, take appropriate disciplinary action, establish and administer tests, and perform such other functions with respect to the regulation of their members as are consistent with the purposes of this title. The Commission shall report to the Congress, within eighteen months from the date of enactment, the results of its study together with such recommendations for legislation as it deems advisable.

"(e) The Commission is authorized and directed to make a study of regulations of registered investment advisers, under this title and corresponding State laws, in order to determine (1) whether and to what extent such laws impose unnecessarily duplicative regulation on registered investment advisers; (2) the effects of any such duplicative regulation on registered investment advisers, investors, and the public and

on the achievement of the purposes of this title; (3) whether and to what extent it is feasible to reduce or eliminate any undue burdens caused by such duplicative regulation at the Federal or State level through consultation and coordination between the Commission and the appropriate State authorities; and (4) whether additional legislation to achieve more uniform and consistent regulation of registered investment advisers is necessary or appropriate in the public interest. The Commission shall report to the Congress, within eighteen months from the date of enactment, the results of its study together with such recommendations for legislation as it deems advisable.

"(f) The Commission, in furtherance of the studies required by subsections (c), (d), and (e) of this section, shall create one or more advisory committees pursuant to the Federal Advisory Committee Act, and is authorized to employ one or more outside experts and to hold such public hearings as it may deem advisable. Such advisory committee or committees may be composed of (1) individuals who are associated persons or representative of registered investment advisers, including (A) investment counsel, as defined in section 208(c) of this title, (B) publishers and, (C) investment advisers to investment companies registered under the Investment Company Act of 1940; (2) individuals who are themselves registered investment advisers; (3) individuals who

are not associated persons or representative of any investment adviser, whether or not registered, or any broker or dealer; (4) individuals who are or are representative of financial analysts; and (5) such other persons as the Commission deems desirable, including individuals who are associated persons or representative of (A) brokers or dealers registered under the Securities Exchange Act of 1934, (B) insurance companies, (C) banks, and (D) State securities commissions or State agencies performing similar functions.".

SEC. 11. This Act shall become effective on the date of its enactment, except that the amendment made by this Act to sections 203(b) and 208 (other than subsection (g) thereof) of the Investment Advisers Act of 1940 (15 U.S.C. 80b–3(b) and 80b–8) shall become effective one hundred eighty days after the date of enactment of this Act.

Appendix B

[SUBCOMMITTEE PRINT]

JULY 30, 1976

Showing H.R. 13737 as ordered reported by the Subcommittee on Consumer Protection and Finance

94TH CONGRESS
2D SESSION

H. R. 13737

A BILL

To amend the Investment Advisers Act of 1940 to authorize the Securities and Exchange Commission to prescribe standards of qualification and financial responsibility for investment advisers, and for other purposes.

By Mr. MURPHY of New York

MAY 12, 1976

Referred to the Committee on Interstate and Foreign Commerce

95TH CONGRESS
1ST SESSION

H. R. 2105

IN THE HOUSE OF REPRESENTATIVES

JANUARY 19, 1977

Mr. MURPHY of New York introduced the following bill; which was referred to the Committee on Interstate and Foreign Commerce

A BILL

To amend the Investment Advisers Act of 1940 to authorize the Securities and Exchange Commission to prescribe standards of qualification and financial responsibility for investment advisers, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Investment Advisers Act Amendments of 1977".

SEC. 2. Section 208 of the Investment Advisers Act of 1940 (15 U.S.C. 80b–8) is amended by adding at the end thereof the following new subsections:

"(e) (1) No investment adviser, unless exempt from registration pursuant to section 203 (b), shall make use of

the mails or any means or instrumentality of interstate commerce in connection with his business as an investment adviser unless such investment adviser and all natural persons associated with such investment adviser meet such standards and qualifications consisting of (A) passing an appropriate test or examination, or (B) appropriate training or experience, and such standards relating to contractual capacity, as the Commission finds necessary or appropriate in the public interest or for the protection of investors.

"(2) The Commission shall establish such standards and qualifications by rules and regulations, which may specify that all or any portion of such standards and qualifications shall be applicable to any class of investment advisers, except that the Commission shall not require any investment adviser or person associated with an investment adviser who has passed a test or examination to meet requirements relating to training or experience. Such rules and regulations shall not apply to any investment adviser or person associated with an investment adviser meeting standards and qualifications determined by the Commission to be a satisfactory alternative for the purposes of this subsection.

"(3) The Commission shall, prior to the adoption of any rule or regulation prescribing any test or examination pursuant to this subsection, consult the securities commissioners (or any agency or officer performing like functions) of those

States which require investment advisers and associated persons of investment advisers to submit to a test or examination, for the purpose of avoiding, to the extent feasible, any undue burdens which might result from duplicative testing or examination requirements.

"(4) The Commission, by rules and regulations, may prescribe reasonable fees and charges to defray its costs in carrying out this subsection, including, but not limited to, fees for any test administered by it or under its direction.

"(f) No investment adviser who (1) is authorized to exercise investment discretion, as defined in section 3(a)(35) of the Securities Exchange Act of 1934, with respect to an account, (2) has access to securities or funds of a client, or (3) is an investment adviser of an investment company, as defined in section 2(a)(20) of title I of this Act, unless exempt from registration pursuant to section 203(b), shall make use of the mails or any means or instrumentality of interstate commerce in connection with his business as an investment adviser in contravention of such rules and regulations as the Commission shall prescribe as necessary or appropriate in the public interest or for the protection of investors to provide safeguards with respect to the financial responsibility of such investment advisers. Such rules and regulations shall not apply to any investment adviser registered under section 15 of the Securities Exchange Act of

1934 and subject to safeguards with respect to financial responsibility determined by the Commission to be a satisfactory alternative for the purposes of this subsection. The Commission, by rules and regulations, may specify that all or any portion of such safeguards shall be applicable to any class of such investment advisers and may prescribe reasonable fees and charges to defray its costs in carrying out this subsection.

"(g) The Commission is authorized, in connection with the promulgation of rules and regulations under subsections (e) and (f) of this section, to create one or more advisory committees pursuant to the Federal Advisory Committee Act, to employ one or more outside experts, and to hold such public hearings as it may deem advisable.".

SEC. 3. Section 203 (b) of the Investment Advisers Act of 1940 (15 U.S.C. 80b–3 (b)) is amended by striking out paragraph (1) thereof and redesignating paragraphs (2) and (3) as paragraphs (1) and (2), respectively.

SEC. 4. Section 203 (g) of the Investment Advisers Act of 1940 (15 U.S.C. 80b–3 (g)) is amended by striking out "subsection (d)" and inserting in lieu thereof "subsection (c) or subsection (e)".

SEC. 5. The second sentence of section 203 (h) of the Investment Advisers Act of 1940 (15 U.S.C. 80b–3 (h)) is amended to read as follows: "If the Commission finds that

any person registered under this section, or who has pending an application for registration filed under this section, is no longer in existence or is not engaged in business as an investment adviser, the Commission shall by order cancel the registration or application of such person.".

SEC. 6. The first sentence of section 211(c) of the Investment Advisers Act of 1940 (15 U.S.C. 80b–11(c)) is amended to read as follows: "Orders of the Commission under this title (except orders granting registration pursuant to section 203(c) of this title) shall be issued only after appropriate notice and opportunity for hearing.".

SEC. 7. The first sentence of section 214 of the Investment Advisers Act of 1940 (15 U.S.C. 80b–14) is amended to read as follows: "The district courts of the United States and the United States courts of any territory or other place subject to the jurisdiction of the United States shall have jurisdiction of violations of this title or the rules, regulations, or orders thereunder, and, concurrently with State and territorial courts, of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of, this title or the rules, regulations, or orders thereunder.".

SEC. 8. Section 202(a)(10) of the Investment Advisers Act of 1940 (15 U.S.C. 80b–2(a)(10)) is amended by inserting before the period at the end thereof a comma

and the following: "and includes intrastate use of (A) any facility of a national securities exchange or of a telephone or other interstate means of communication, or (B) any other interstate instrumentality".

SEC. 9. Section 202(a)(17) of the Investment Advisers Act of 1940 (15 U.S.C. 80b–2(a)(17)) is amended to read as follows:

"(17) The term 'person associated with an investment adviser' means (A) any partner, officer, or director of such investment adviser (or any person performing similar functions), (B) any person directly or indirectly controlling or controlled by such investment adviser, including any employee of such investment adviser, or (C) any person directly or indirectly under common control with such investment adviser who furnishes advice or issues analyses or reports to or for such investment adviser or who, if a natural person, has responsibility for, or performs duties connected with, the activities of such investment adviser; but does not include, for the purposes of section 203 (other than subsection (f) thereof) and section 208(e) of this title, persons associated with an investment adviser whose functions are clerical or ministerial. The Commission may, by rules and regulations, classify, for the purposes of any portion or portions of this title, persons associated with an investment adviser within the meaning of this paragraph.".

SEC. 10. Section 202 of the Investment Advisers Act of 1940 (15 U.S.C. 80b–2) is amended by adding at the end thereof the following new subsections:

"(c) The Commission is authorized and directed to make a study of the extent to which persons not included in the definition of 'investment adviser' or specifically excluded therefrom engage in activities which are the same as or similar to those engaged in by investment advisers, including but not limited to (1) the furnishing of advice, either directly or through publications or writings, as to the value of securities or the advisability of investing in, purchasing, or selling securities, (2) the insurance or promulgation of analyses or reports concerning securities, and (3) the exercise of investment discretion with respect to securities accounts, and whether the omission or exclusion of such persons from the definition of 'investment adviser' is consistent with the protection of investors and the other purposes of this title. Such study shall include an analysis of the extent to which the inclusion of additional persons in the definition of 'investment adviser', including, but not limited to, those persons who render investment advice, through speech or publication, in a nonindividualized manner, would contravene the rights of freedom of speech and freedom of the press, and the right to petition the Government for a redress of grievances guaranteed by the first

amendment to the Constitution of the United States. The Commission shall report to the Congress, within eighteen months from the date of enactment, the results of its study together with such recommendations for legislation as it deems advisable.

"(d) The Commission is authorized and directed to make a study of whether and to what extent the protection of investors and the other purposes of this title would be facilitated by the establishment of one or more self-regulatory organizations which would be registered with the Commission and, subject to appropriate Commission oversight, adopt rules, establish standards of conduct, take appropriate disciplinary action, establish and administer tests, and perform such other functions with respect to the regulation of their members as are consistent with the purposes of this title. The Commission shall report to the Congress, within eighteen months from the date of enactment, the results of its study together with such recommendations for legislation as it deems advisable.

"(e) The Commission is authorized and directed to make a study of regulations of registered investment advisers, under this title and corresponding State laws, in order to determine (1) whether and to what extent such laws impose unnecessarily duplicative regulation on registered investment advisers; (2) the effects of any such

duplicative regulation on registered investment advisers, investors, and the public and on the achievement of the purposes of this title; (3) whether and to what extent it is feasible to reduce or eliminate any undue burdens caused by such duplicative regulation at the Federal or State level through consultation and coordination between the Commission and the appropriate State authorities; and (4) whether additional legislation to achieve more uniform and consistent regulation of registered investment advisers is necessary or appropriate in the public interest. The Commission shall report to the Congress, within eighteen months from the date of enactment, the results of its study together with such recommendations for legislation as it deems advisable.

"(f) The Commission, in furtherance of the studies required by subsections (c) (d), and (e) of this section, shall create one or more advisory committees pursuant to the Federal Advisory Committee Act, and is authorized to employ one or more outside experts and to hold such public hearings as it may deem advisable. Such advisory committee or committees may be composed of (1) individuals who are associated persons or representative of registered investment advisers, including (A) investment counsel, as defined in section 208 (c) of this title, (B) publishers, and (C) investment advisers to investment companies registered under the Investment Company Act of 1940; (2) individuals who are

themselves registered investment advisers; (3) individuals who are not associated persons or representative of any investment adviser, whether or not registered, or any broker or dealer; (4) individuals who are or are representative of financial analysts; and (5) such other persons as the Commission deems desirable, including individuals who are associated persons or representative of (A) brokers or dealers registered under the Securities Exchange Act of 1934, (B) insurance companies, (C) banks, and (D) State securities commissions or State agencies performing similar functions.".

SEC. 11. This Act shall become effective on the date of its enactment, except that the amendment made by this Act to sections 203(b) and 208 (other than subsection (g) thereof) of the Investment Advisers Act of 1940 (15 U.S.C. 80b–3(b) and 80b–8) shall become effective one hundred and eighty days after the date of enactment of this Act.

95TH CONGRESS
1ST SESSION

H. R. 2105

A BILL

To amend the Investment Advisers Act of 1940 to authorize the Securities and Exchange Commission to prescribe standards of qualification and financial responsibility for investment advisers, and for other purposes.

By Mr. MURPHY

JANUARY 19, 1977
Referred to the Committee on Interstate and Foreign Commerce

CERTIFICATE OF SERVICE

Service of a copy of the annexed Petition for Rehearing, AND BRIEF OF INVESTMENT COUNSEL ASSOCIATION was amde upon the following counsel for the parties herein by placing same in the United States mail, postage prepaid, this 22nd day of March, 1977.

Messrs. D'Amato Costello & Shea
Attorneys for Defendants-Appellees
Harry Goodkin & Company
116 John Street
New York, N.Y. 10038

Messrs. Hill, Betts & Nash
Attorneys for Defendant-Appellee
Harold B. Ehrlich
One World Trade Center
Suite 5215
New York, N.Y. 10048

Messrs. Shea, Gould, Climenko & Casey
Attorneys for Plaintiffs-Appellants
330 Madison Avenue
New York, N.Y. 10017

Seward & Kissel
Attorneys for Movants
63 Wall Street
New York, N.Y. 10005

George A. Scholze

George A. Scholze
48 Wall Street
New York, N.Y. 10005
(212) 952-8100